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LABOUR STANDARDS IN A GLOBALISED ECONOMY SYMPOSIUM

Individual labour complaint procedures in future free trade agreements?

HENNER GÖTT — 13 November, 2015

In their posts, Tonia Novitz and Patrick Abel mention the idea of enhancing the procedural role for individuals in labour disputes as a means to foster the enforcement of labour provisions in international trade agreements. In this post, I will enquire whether individuals should be given an opportunity to pursue their claims in an individual complaints procedure for labour matters in the context of free trade agreements (FTAs), rather than largely being mediatized in intergovernmental dispute settlement. I will

suggest that an individual complaint procedure, while undoubtedly politically ambitious, could enhance the implementation of labour provisions in FTAs.

Key features

Patrick has rightly identified the over-politicization of inter-state dispute settlement and the marginalization (and, as a consequence, disappointment) of individuals as two major deficiencies of contemporary inter-state labour dispute settlement in US FTAs. Although it might be too early for definite findings, there is a certain potential that similar deficits will surface in dispute settlement under EU FTAs as well.

Any individual complaints procedure would have to attempt to ameliorate or remedy these shortcomings. There is little reason to believe that there is a one-size-fits-all model – obviously, any procedure will be shaped by the particularities of bilateral relations and negotiations. Accordingly, I am not proposing a specific (e.g. a judicial) mechanism here. Still, regardless of what the procedure will look like in detail, the following could be regarded as key features:

1. Improving the procedural role of individuals from being mere 'bystanders' to being procedural subjects. This includes the right to unilaterally initiate the procedure and pursue their claims without depending on the consent of one of the governments.
2. Immediate examination of the case by a neutral and independent body of experts in trade and labour matters, rather than one of the state parties' governments. Its composition could draw on the rules for inter-state labour arbitral tribunals that are already contained in FTAs.

3. Inclusion in the procedure's output of a definite statement on whether there was a violation of FTA labour provisions in the particular case at hand.

Possible benefits

It is suggested that such a setting would echo more clearly the true nature of many labour disputes as disputes originally arising between domestic non-state actors and 'their' states. More importantly, the other FTA party would not act as a 'political claimant' anymore, but could take the role of a third party or an observer. Arguably, this might help to keep away issues of intergovernmental diplomacy extrinsic to the subject-matter of the dispute, thereby de-politicizing and rationalizing the process of settlement.

At the same time, greater alignment of initiative and interest to pursue a labour claim and the respective procedural capabilities, together with an output addressing the particular cases at hand, could help to reinforce the implementation of labour provisions, increase accountability of governments and work against the 'disappointment trap'. Enhancing implementation of international agreements by granting 'functional subjective rights', i.e. enabling non-state actors with a particular interest in the subject-matter to claim violations of treaty provisions, has proven fruitful in other areas of law. Regarding the trade-labour nexus, it could help to achieve the macroeconomic goal of enhanced labour protection.

Finally, a systemic argument applies to those FTAs containing strong mechanisms for implementing other chapters, notably trade and investment disciplines: Enhancing the implementation of labour provisions by providing 'functional subjective rights' could be one way to

maintain (or restore) an 'enforcement balance', i.e. to bring to bear the different interests affected by the FTA in a more balanced manner.

The 'buts'

Obviously, the above is an idealistic suggestion, and a number of counter-arguments might come to mind. I will try and address at least some of these 'buts' here.

Is de-politicization an achievable and desirable goal?

On the goal of de-politicization, it is obvious that an individual complaints procedure cannot replace, but only complement intergovernmental labour cooperation (and civil society participation) as provided for in current FTAs. Cooperative mechanisms would especially retain the task of articulating the more general political agenda for labour in a FTA context. By contrast, an (institutionally separate) complaints mechanism would be a tool to implement agreed-upon labour standards in an effective and accountable way.

With regard to the complaint mechanism, the aim should not be to entirely ban political discourse. Rather, the goal is to identify means of appropriately integrating the inherently political nature of labour disputes into the institutional and procedural arrangement of the complaints procedure. Again, other dispute settlement mechanisms might provide inspiration here: One could think of e.g. mandatory cooling-off periods. A second option would be to admit submissions by employers and the other FTA party to present their respective views on the matter to the neutral body. Third, representatives or lay assessors nominated by the social

partners could join the body in decision-making. For a last example, the FTA's political committees could be enabled to react to decisions by adopting joint interpretations of the relevant provisions which are binding for future cases, a tool already entailed in some contemporary FTAs to shape (and re-direct) future treaty practice.

How to ensure the relevance of the output?

How to ensure that the complaint procedure's output actually has an impact? This question needs to be divided into monitoring and enforcement issues. Monitoring could rest with the competent FTA trade and labour committee. It should encompass a follow-up procedure involving the original claimants.

Arguably the most conceptually challenging part would be to find appropriate means to enforce the output. Repeatedly, the possibility of enforcement through 'trade sanctions' has been deemed a major advantage of including labour provisions in trade agreements. However, leaving aside that trade sanctions as an intergovernmental tool might not be suitable in the context of an individual complaints mechanism, both a temporary suspension of trade benefits and monetary fines may miss the mark: The former affects not only the actual perpetrator of labour law violations, but the export industry as a whole, while the latter primarily hits the state's budget and can thus become a disincentive for employers to respect labour standards if not backed by an option to seek redress.

In any event, it might be helpful to evaluate if there are other options. One could e.g. consider whether the record of compliance with the neutral body's decision could be

included in the review of other policies vis-à-vis that state. A more ambitious, but arguably less politicized option could be to provide for reparation or just satisfaction for the claimant, if not sufficiently provided for by domestic law.

Conclusion: A burden or a chance?

As I mentioned in the introduction to this symposium, there are concerns that pushing too hard on labour issues would politically overburden FTA negotiations as a whole. Without doubt, enhancing the procedural capabilities of individuals is ambitious. On the other hand, quite unlike free-standing labour treaties, trade and investment agreements 'sell' and might offer a rare chance to promote other aspects that are intrinsically linked to (and affected by) market liberalization. That increased procedural capabilities for individuals can help to achieve the goals of a treaty and at the same time increase government accountability is illustrated by experiences under human rights and investment protection regimes. At the same time, providing for a neutral and independent examination of cases could help to mitigate allegations concerning protectionism and abuse of economic power – a recurring objection by economically weaker trading partners under present FTAs.

An individual complaints procedure will certainly not be a panacea for the whole range of trade and labour issues, but it is a chance for improvement and an option worth considering.

Ass. iur. Henner Gött, LL.M. (Cantab.) *is a doctoral candidate at the Institute of International and European Law, Department of International Economic and Environmental*

Law (Prof. Dr. Peter-Tobias Stoll), Georg-August-University Göttingen.

ISSN 2510-2567

Tags: *Dispute Settlement*, *FTA*

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